MINORITY VIEWS OF THE HONORABLE DAVID OBEY, STENY HOYER, NITA LOWEY, ROSA DELAURO, JESSE JACKSON, JR., PATRICK KENNEDY, AND LUCILLE ROYBAL-ALLARD ON THE ADMINISTRATION'S OVERTIME REGULATION

The Administration is poised – in a few short weeks – to implement the most sweeping, anti-worker revision of the Fair Labor Standards Act (FLSA) since its inception in 1938. The overtime pay requirements of the FLSA, which guarantee for most workers "time and a half" pay for hours worked beyond a standard 40-hour work week, are one of the nation's bedrock worker protections. The FLSA's overtime provisions cover approximately 115 million workers – about 85 percent of the nation's workforce.

On August 23rd, 2004, the Department of Labor's final overtime regulations (redefining who is considered a professional, administrative, or executive employee and thereby exempt from overtime pay) are slated to go into effect, giving employers a huge windfall taken right out of employees' paychecks. On the eve of Labor Day, more than 6 million Americans soon will be getting less pay for their labors courtesy of the Bush Administration.

This anti-worker regulation is just the latest attack on America's workers by this Administration. Since President Bush entered office, 1.8 million private sector jobs have been lost. Despite modest job creation in the last few months, some 8.2 million Americans remain unemployed - 2.3 million (38 percent) more than when President Bush entered office. Further, more unemployed individuals are out of work for longer periods of time. In June 2004, 1.7 million individuals had been unemployed for over 6 months - nearly triple the number of long-term unemployed at the start of the Administration.

For families who received overtime pay in 2000, overtime earnings accounted for about 25 percent of their income or about $8,400 a year. Overtime compensation is essential to their ability to pay mortgages, medical bills, and make ends meet. Yet, despite the urgent need to halt the Administration's assault on these workers, the House Appropriations Committee rejected, by a party line vote of 29 to 31, a Democratic amendment that would have prevented the Administration from rolling back the 40-hour workweek.

Last year, both the House and the Senate voted to stop the Administration from taking away workers' rights to overtime when the

Department of Labor issued its initial proposal to strip overtime protections away from 8 million workers. The Senate twice adopted amendments offered by Senator Tom Harkin to prohibit the Administration from taking away overtime pay. Last October, the House voted to adopt the Obey-Miller Motion to Instruct by a vote of 221 to 203.

Both the Harkin Amendment and the Obey-Miller Motion to Instruct would have restricted the Administration's ability to disqualify anyone from overtime protection, while retaining virtually the only positive change in the initial regulation – a long overdue and non-controversial increase in the protective salary threshold to guarantee overtime rights for low-income workers. Democrats support extending overtime protections to more low-income workers, even though the Administration's proposal fails to provide a true inflationary adjustment to the salary threshold. (Moreover, we now know that that far fewer workers would actually benefit from this change than claimed by the Department of Labor.)

Yet, despite passage of these measures in the Senate and the House – in opposition to all the traditions of the Congress – the Republican leadership stripped the Harkin language from the final fiscal year 2004 omnibus appropriations bill, allowing the Department of Labor to proceed with its anti-worker regulation.

On July 14th, the Committee on Appropriations had an opportunity to preserve the hard-earned overtime rights for working Americans by adopting the Democratic amendment. The Democratic amendment was identical, in effect, to the earlier measures approved by both the House and the Senate. It would have prohibited the Department of Labor from implementing the final rule to disqualify workers from overtime coverage. At the same time, it would have allowed the expansion of overtime rights for low-income workers earning up to $23,660 a year, precisely as proposed by the Department of Labor in its final regulation.

The Democratic amendment would protect more than 6 million workers in a broad range of occupations now at risk of losing their overtime rights according to estimates made by the Economic Policy Institute (EPI).[1] Indeed, an even larger number of workers are likely to be harmed by the Administration rule because EPI examined only 10 of the hundreds of occupational categories covered by the Bush anti-worker regulation.

The Democratic amendment would protect:

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[1]Ross Eisenbrey, Economic Policy Institute, "Longer Hours, Less Pay", July 14, 2004.

- 2.3 million workers who lead teams of other employees assigned to major projects – even if these team leaders have no direct supervisory responsibilities for other employees on the team. About 40 percent of employers with 50 or more employees routinely use work teams. Under the Department of Labor's final regulation, however, we can expect even more employers to take advantage of this new exemption with enormous negative consequences for employees;

- Nearly 2 million low-level working supervisors in fast food restaurants, lodging and retail stores. Under the Department of Labor's final regulation, these employees could lose 100 percent of their overtime eligibility even though only a small percentage of their time is spent on managerial work. For example, a low-paid Burger King assistant manager who spends nearly all of his or her time cooking hamburgers and serving customers, with no authority to hire or fire subordinates, could lose all of his or her overtime pay. Moreover, it will now be easier for employers to evade the rules by converting hourly employees to exempt salaried employees;

- More than 1 million employees without a college or graduate degree. These employees will now be exempt from overtime pay as professional employees because employers will be able to substitute work experience for a degree under the Department of Labor's final regulation.

  Moreover, the Department of Labor has not resolved the question of whether training in the military can be considered substitute work experience. Thus, despite Labor Department denials, many veterans employed in engineering, accounting, and technical occupations could lose overtime pay. For example, the Boeing Corporation observed, "*...many of its most skilled technical workers received a significant portion of their knowledge and training outside of the university classroom, typically in a branch of the military service...*"[2];

- 30,000 nursery school and Head Start teachers. These already low-paid employees, who currently receive overtime pay because their jobs do not require them to exercise sufficient discretion and judgment to be considered professional employees, will lose the right to extra pay under the Department of Labor's final regulation;

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[2] Cheryl A. Russell, Boeing's director of federal affairs as quoted in The Washington Post, January 29, 2004.

- 160,000 mortgage loan officers and hundreds of thousands of additional workers in the financial services industry. These employees will lose their overtime rights because of a blanket industry exemption in the Department of Labor final regulation for financial service employees who work at such duties as collecting customer financial information, providing information and advice about financial products, or marketing financial products;

- Nearly 90,000 computer employees, funeral directors and licensed embalmers. These employees will become exempt and lose their right to pay under the Department of Labor's final regulation; and

- Nearly 400,000 workers earning more than $100,000 annually. Under the Department of Labor final regulation, these highly compensated employees will lose overtime pay under a new blanket exemption if they perform only a single exempt task "customarily or regularly", such as suggesting discipline, promotion or assignment of other employees perhaps as infrequently as twice a year. Over time, as incomes grow, the number of employees bumped into this new exclusion from overtime pay will increase.

The Department of Labor failed to hold a single public hearing on one of the most controversial regulations in the history of the Department, despite receiving 75,280 comments on its proposals. Indeed, the Department of Labor even provided information to employers in its initial regulation on how to escape overtime pay requirements as part of a concerted campaign to give employers dozens of new ways - both obvious and subtle – to reclassify workers to cut costs,

> *"Affected employers would have four choices concerning potential payroll costs: (1) Adhering to a 40 hour work week; (2) paying statutory overtime premiums for affected workers' hours worked beyond 40 per week; (3) raising employees' salaries to levels required for exempt status by the proposed rule; or (4) converting salaried employees' basis of pay to an hourly rate (no less than the federal minimum wage) that results in virtually no (or only a minimal) changes to the total compensation paid to those workers. Employers could also change the duties of currently exempt and nonexempt workers to comply with the proposed rule."*[3]

The Administration claims that its overtime regulation will strengthen and expand overtime protections. The facts say different. Even the Republican-led Senate voted 99 to 0 in favor of the amendment

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[3] Federal Register, Vol. 68, No. 61, March 31, 2003, page 15576.

offered by Senator Judd Gregg to protect overtime rights in 55 job classifications - including blue-collar workers, registered nurses, police officers, and firefighters - because they had no confidence in the Administration's claims.

The Administration claims that its overtime regulation will reduce costly and lengthy litigation. However, three experts who formerly administered the FLSA in the Department of Labor during both Republican and Democratic administrations reached exactly the opposite conclusion,

> *"Further, in our view, the Department has written rules that are vague and internally inconsistent, and that will likely result in a profusion of confusion and court litigation – outcomes that the Department explicitly sought to avoid."* [4]

For example, the former Department of Labor officials observed that,

> *"The team leader provision in new Sec. 541.203 (3) is an entirely new regulatory concept that is also fraught with ambiguity. This provision is not based on case law, but is purportedly an attempt to reflect modern workplace practices.... Furthermore, the regulations do not address the very real possibility that team leaders may be working on a number of different short- or long-term projects, simultaneously or in succession, some of which would be major and directly related to the performance of management or general business operations and some of which would not. Evaluating the team leader's primary duty in that instance will be very difficult at best. Would the employee, for example, move in and out of exempt status from one week to the next? How this provision will operate in practice can only be imagined, but one can surmise that employers will seek to apply this provision to large numbers of employees to whom the exemption was never intended to apply."*[5]

Rather than providing more clarity to protect more workers, the Administration's overtime regulation constitutes an open invitation to dispute. The Department of Labor deliberately has replaced longstanding, objective criteria by which employers and employees could clearly understand who qualifies for overtime pay and who does not with ambiguous concepts and criteria. These changes will require subjective

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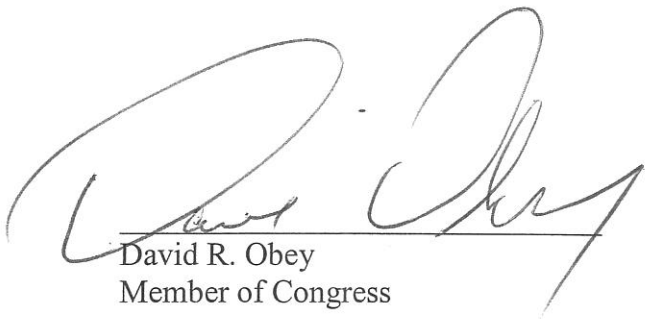
[4]John Fraser, Monica Gallagher, and Gail Coleman, "Observations on the Department of Labor's Final Regulations *Defining and Delimiting the [Minimum Wage and Overtime] Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees"*, July 2004.

[5] Ibid.

judgments by employers that no doubt will be made based on the employers' economic interests to the detriment of workers. Practically the only instances in which the Labor Department "clarified" the rules are by declaring virtually entire classes of workers – for example, financial services workers, insurance claims adjusters, athletic trainers, funeral directors and embalmers, and employees earning more than $100,000 – ineligible for overtime pay.

At a time when millions of families feel lucky just to have a job, this Committee should have rejected the Administration's proposed pay cut for 6 million American families. By failing to adopt the Democratic amendment, the Committee failed to uphold the values of working and middle class Americans who simply want a fair day's pay for a hard day's work.



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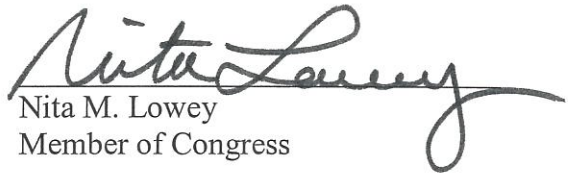

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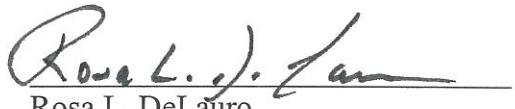

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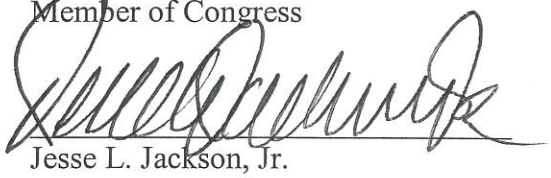

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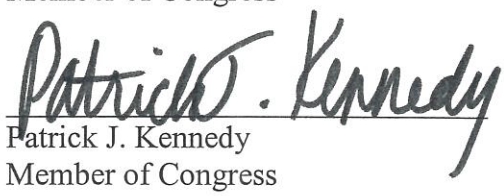

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Member of Congress

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Member of Congress